REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 132 of 2011

THOMAS MWAURA GITAU.....1ST PLAINTIFF

PETER GACHENGA KIMUHU.....2ND PLAINTIFF

VERSUS

ERIC CURLINGTON MUHATI.....1ST DEFENDANT

THE CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

THE TRUSTEES OF KOMAROCK EAST OFFICE.....3RD DEFENDANT

RULING

This is an application brought by the 1st Defendant herein **Eric Curlington Muhati.** The application is brought under *Section 3A* of the Civil Procedure Act *Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rule, 2010* and all other enabling provisions of the Law.

The applicant/1st Defendant prayers are that the court to dismiss the suit herein for want of prosecution and for costs of the suit.

The application is supported by the affidavit of Enonda A. M. Dickson, Advocate and the grounds on the face of the application. The grounds for the application are: -

1.The instant suit was filed on 29th March, 2011 under certificate of urgency.

2.The plaintiff had sought for an injunction, and the matter came up for hearing on 6th May 2011, when the said order was issued on condition the plaintiff file and serve on undertaking as to damages.

3.That the plaintiff has never filed nor served the said undertaking.

4.Further the matter was last in court on 8th June, 2011 when the court directed that the matter do proceed for full hearing upon the Plaintiff amending the a plaint.

5.That it is now one year and the plaintiff has not taken any step to fix this matter for hearing.

6.That the delay is inordinate, inexcusable and continues to occasion prejudice and injustice to 1st Respondent and it is for the interest of Justice that the application be allowed.

Mr. Enonda for the 1st Defendant's applicant in his supporting affidavit further confirmed that he is in conduct of this matter and that from 5/6/2011 when the matter was last in court, the plaintiff has not taken

any step to have the matter set up for hearing. He further averred that the delay has caused prejudice to the 1st Defendant and has also subjected him to perpetual legal costs and anxiety. Mr. Enonda urged this court to allow the application dated 11/7/2012 with cost.

On 21/11/2012, when the matter came up for hearing of this application, the plaintiffs (1st and 2nd Plaintiff), 2nd Defendant and 3rd Defendant were not present in court. There were affidavits of service filed by the 1st Defendant/Applicant to show that the instant application was served upon the plaintiffs counsel Mr. Z. Mwau & Co. Advocates and City Council of Nairobi, 2nd Defendant. The matter therefore proceeded in the absence of the plaintiffs and also the 2nd and 3rd Defendants (3rd Defendant has not entered appearance).

The application was therefor not opposed. Mr. Enonda on prosecuting the application urged the court to dismiss the suit upon the premises that the pleadings have since been closed. That the matter was last in court on 8/6/2011 and it is now more than one year and plaintiffs have not taken any step to prosecute this matter.

Though the application is not opposed, the court is called upon to make a finding as to whether this application is merited. The application is for dismissal of the suit for want of prosecution.

I have carefully considered the instant application, the court records and the relevant law and I make the following observations and findings.

It is indeed correct that the suit herein was filed on 29/3/2011. The same was certified urgent on 30/3/2011 by Muchelule, J and set down for interpartes hearing on 6/4/2011. On 6/11/2011, when the matter came for hearing of the application dated 20/3/2011. the parties by consent agreed to have the status quo maintained i.e. construction by 1st defendant was suspended upon the plaintiff's filing an undertaking in damages within 7 days from 6/4/2011. However, upon perusal of the court record, I have not seen such undertaking. The plaintiff therefore did not fulfill that condition of the court of

6/4/2011 - ***"to file undertaking as to damages within 7 days of today".***

The counsels had also undertaken to file skeletal written submissions. The same were not filed.

On 8/6/2011 the plaintiffs counsel applied to join Nairobi City Council (2nd Defendant and Trustees of Komarock East Office as Defendants. The said application was allowed by consent and the amended plaint was to be filed within 7 days of 8/6/2011. The said amended plaint was file on 16/6/2011 as per the court record. Thereafter the 1st Defendant filed Memorandum of Appearance and list of Exhibits on 4/8/2011. 2nd Defendant filed statement of defence of 30/8/2011.

Upon perusal of this file, I have noted that after the plaintiff filed their amended plaint, they did not file their undertaking as to damages as per the court order of 6/4/2011. The plaintiff have also not taken any action to have the matter heard and disposed off. On 6/4/2011, the status quo were maintained; thus the 1st Defendant was ordered to suspend any construction on the suit premises.

The 1st Defendant urged the court to dismiss the plaintiff's suit due to the inordinate delay in having the matter heard and determined. That such delay is prejudicial to the 1st Defendant and it is inexcusable.

The application is premised under Section 3A of the Civil Procedure Act which provides that:-

"Nothing in this Act shall limit on otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court"

Section 3A of Civil Procedure Act therefore donates to this court inherent power to make such orders that would necessitate ends of justice and prevent abuse of court process. The plaintiff herein obtained an order for maintenance of **status quo** thus, **suspension of construction by the 1st defendant**. However, they have done nothing to expedite this matter. Isn't that an abuse of the court process? Is the action of

suspending construction by 1st defendant prejudicial to him (1st Defendant) or causing injustice? If the answers to the above questions are affirmative, then the court will have no alternative but to find that the delay by the plaintiff herein in prosecuting this matter or setting it up in motion is on abuse of the court process.

The application is also premised upon *Order 17 Rule 2 (3) of the Civil Procedure Rules* which rule starts as follows: -

Rule 17 (2) (3).

"Any party to the suit may apply for its dismissals as provided in sub-rule 1".

Sub-rule 1 i.e. 17)2) (1) provides.

"In any suit in which no application has been made and step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to court's satisfaction (Court) may dismiss the suit".

In the instant suit, the matter was last in court on 8/6/2011. the suit was brought forth by the plaintiffs. It is more than one year and the plaintiffs have not made any step to have the matter prosecuted. Thought the court did not give notice to show cause, the 1st Defendant have rightly moved the court as provided by *Order 17 Rule 2 (3)* to have the suit dismissed for want of prosecution. The plaintiffs herein thought served with the application as per the affidavit of service filed in court did not attend court *to show cause* to the satisfaction of the court as to why the suit may not be dismissed.

As was held by Warsame, J in the case of ***"Mobile Kitale Service Station vs. Mobil Oil Kenya Ltd and another. Civil case No. 205 of 1990, that "dismissal of the suit for want of prosecution is meant to prevent injustice and an abuse of the process of the court".***

The Judge further held ***"It is the duty of the plaintiff and his advocation to bring the suit for trial. Usually the burden is on their shoulders and failure to discharge that onus would be detrimental to their cause".***

The plaintiffs herein brought this suit on 29/3/2011. They have not taken any action from 8/6/2011. the plaintiffs have therefore failed to discharge their owner and as was rightly held by Warsame J, that failure to detrimental to their cause. Why do I say so?

The 1st Respondent Counsel has now brought this application for dismissal of the suit for want of prosecution. The said application was not apposed but it is evident that plaintiff have not expedited the matter.

Since it is evident that the plaintiffs have not taken any action for more than one year, what will prevent the court from finding that this suit is on abuse of the court process, and that the court has a duty to prevent such abuse of the court process?

In conclusion, I will further borrow the words of **Warsame J** in the same case earlier quoted that;

"It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matter expeditiously".

Expeditious disposal of cases is also the spirit or the tone of Section 1A of the Civil Procedure Act which states that: -

"The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act".

The plaintiffs' action of failure to set the matter in motion for more than one year is not in tandem with the objective of *Section 1A of Civil Procedure Act*. Having now carefully considered the instant application, and the relevant law, I find that the Applicant/1st Defendant be dismissed for want of prosecution.

The Court allows the 1st Defendant/Applicant application dated 11/7/2012 with costs.

Dated, signed and delivered this 26th day of November, 2012

L.N. GACHERU
JUDGE

In the Presence of:

….....for the Applicant

….....for the Defendants

….....Court Clerk